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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

No. 128

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary, *et al.*,
*Appellants,*

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY *et al.*,
*Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois.

## REPLY BRIEF FOR APPELLANTS.

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## REPLY BRIEF FOR APPELLANTS.

The appellants are in receipt of copy of a brief filed on behalf of all the appellees, except the City of Chicago. It is hoped that a reply brief will help clear up some points which may seem to be left obscure by the preceding briefs.

Preliminary to meeting the contentions made on behalf of appellees, let it be said that much of their labor was unnecessary. No question of sovereignty

is involved, nor is any claimed on behalf of the "Pottawatomie Nation," and appellees' counsel have evidently missed the distinction between political or personal rights of the Indians on the one hand, and their rights of property on the other hand. The former are subject to change or repeal; the latter, when vested, are protected by the Constitution. (See Appellants' Brief, pp. 119-122; Point XXXI).

## I.

The first contention of appellees is that improper parties to the bill were made complainants and defendants. They are pleased to regard the bill as one brought by individuals, and cite a number of cases to support their contention that the bill should be brought by the nation or tribe itself. But this is a bill by the Pottawatomie Nation or such part of it as may be found to be entitled to invoke the provisions of the treaty. Who are so entitled is ordinarily a question for the administrative department of the government; but the enforcement of a treaty by the courts can only be asked on behalf of a tribe or nation. That is the extent of the meaning of the decisions relied on by appellees.

Appellants' brief fully recognized this situation and pointed it out (Brief, Point XLIII, pages 138-145). A suit by an Indian tribe or nation is properly brought when it is brought by its representative chiefs and tribal officers (Points XLIII, LXV, LXVII; Brief, pages 138-45, 36-38).

We presume, if complainants' bill, instead of reading "John Williams, Chief, *et al.*, bring this action

on behalf of themselves and of all members of the Pokagon band of Pottawatomie Indians, and of all other members of the Pottawatomie Nation of Indians, if any, who are entitled to join herein with them, and of all others, if any, who are entitled to join herein with them," the bill had stated, "the Pokagon Band, the Pottawatomie Nation, and all others, etc., by John Williams, Chief," etc., it would have more nearly met the view of appellees. Any such difference (particularly in the matter of asserting an Indiana claim to which the technical rules of pleading have not ordinarily been applied) would be trivial and obviated by a very slight form of amendment. But even as to form the bill follows precedents approved by this court as indicated.

Appellees misapprehend the point of the decisions which they cite on this contention. A typical case is *Blackfeather* v. *United States*, 190 U. S. 368, cited on page 19 of their brief. The point is made that in that case the court "denied the jurisdiction to determine the rights of individual members of the tribes." The jurisdiction denied was that of the court of claims which had authority to proceed only under a special act, and the act failed to confer that jurisdiction.

In *Fleming* v. *McCurtain*, 215 U. S. 56, cited on pages 18-19 of appellees' brief, a point relied on seems to be, in the language of the court, "the grant also was at an end when the nations ceased to be," etc.; but that also was because of the peculiar provision of a treaty there involved, limiting the grant to the life of the nation as such. But the government never took advantage of this limitation.

Practically, the holding of those cases was that the original complainants did not show that they were members of the respective tribes and hence entitled to the benefit of treaties made with them; and that at all events the question was one for the government and not for the courts.

The contentions by appellees that the complainants "do not aver that they sustain any tribal relations" (Appellees' Brief, p. 23) is against the allegations of the bill (Trans. 1, Rec. 8; Trans. 2, Rec. 9, paragraph 2; also Trans. 4, Rec. 12, paragraph 12; Trans. 9, Rec. 22). If appellees' contention were true, however, that would be immaterial (Appellants' Brief, pages 144-145).

## II.

The second contention of appellees is that a remedy at law exists. This is answered in the following portions of Appellants' Brief: pages 145-147; point LXXV, p. 40; point LXVI, p. 37; LXIX, p. 38; LXX, p. 39; LXXI, p. 39; LXXIII, pp 39-40. If appellees' contentions on this score are right, innumerable suits at law would have to be brought by the complainant tribe (and a suit at law by an Indian tribe is, we believe, without precedent); with each new trespass on a previously unoccupied piece of land a new suit at law would be brought, for according to the contention of appellees the title, if established, as to one piece of land, would not quiet the title as to another; and the procession of common law suits would never quite overtake new trespasses such as are alleged by the bill as being threatened

(Trans. 9-10; Rec. 22-23, paragraph 25-26). It is clear that such a situation is properly met by a bill in equity such as the present.

## III.

This number presents appellees' contentions as to laches. These are fully anticipated and met in appellants' brief (pp. 126-136). Here two cases are cited in support of appellees' contention, viz.: *Schrimpscher* v. *Stockton*, 183 U. S. 290; *Felix* v. *Patrick*, 145 U. S. 317. *Both of these cases relate to titles which were made alienable by special treaties or statutes.* This is perhaps distinction enough. In addition are the following points of distinction:

1. Those cases were heard on the facts.

2. There was nothing on the record to put purchasers on notice and the rights of innocent purchasers had intervened. In the present case the Greenville treaty was notice to the whole world (Appellants' Brief, pp. 148-150) and actual notice is averred in the bill as to more or less of the lands in question (Trans. p. 5, Rec. pp. 14-15, Par. 16).

3. In the cases cited by appellees, actual adverse possession as distinguished from mere constructive possession, had run for the full period of limitations.

## IV.

Under this number actual merits of the title are discussed. Reliance is particularly placed on the cases of *Johnson* v. *McIntosh*, 8 Wheat. 543; *U. S.* v. *Cook*, 19 Wall. 591; and *Beecher* v. *Wetherby*, 95

U. S. 517. Neither of these cases was decided with reference to the Greenville treaty and that treaty was in no wise under consideration or construction. In the first named case the facts under consideration arose some years before the Greenville treaty had been entered into. In the other two cases there had been a grant of section 16 in each township in Wisconsin, but the Indian title had not yet been extinguished in the greater part of the state. This court held that, though the Indian title was extinguished later, the fee granted to the state related back to the time of the grant by the government and the right of possession attached as soon as the Indian title was extinguished. It was in this sense that the language upon which appellees rely was used, viz.: "The possession, when abandoned by the Indians, attaches itself to the fee without further grant." "Abandoned," as pointed out in our brief (pages 170-174) is used in the sense of cession *and* removed by the Indians, or, in other words, the extinction of the Indian title.

It is apparent that appellees misconstrue the language of these decisions, which are later distinguished so as to bring them in entire harmony with the contentions of appellants in the present case. The *Cook* and *McIntosh* cases should be read in the light of *U. S.* v. *Paine Lumber Co.*, 206 U. S. 467; and *Beecher* v. *Wetherby* in connection with *M. K. & T. Ry. Co.* v. *Roberts*, 152 U. S. 114-117.

Mr. Justice Field said in the last named case, while commenting on *Buttz* v. *Northern P. R. Co.*, 119 U. S. 55:

> "The right of the United States to dispose of the fee of land occupied by them, it added, has

> always been recognized by this court from the foundation of the government. There are, however, certain well established doctrines controlling the action of the government, which can always be invoked to prevent hasty and improvident action against the Indians. It has always been held that the occupancy of lands set apart by statute or treaty with them for their use cannot be disturbed by claimants under other grants of the government *not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands.*
>
> "*And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and preemption.*"

Incidentally, it may be noted whenever the government did express such intention it was *when selling as guardian or trustee,* the proceeds becoming trust funds for the Indians.

What was said in *Doe* v. *Wilson,* 64 U. S. 457, is explained in *Crews* v. *Burcham,* 1 Black, 352, wherein the court said:

> "Some expressions in the opinion delivered in the case of *Doe* v. *Wilson,* the first case that came before us arising out of this Treaty, were the subject of observation by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of their scope and purport. It was supposed that the court held the reservee was a tenant in common with the United States *after the Treaty of Cession,* and until the surveys and patent. It will be seen, however, that the tenancy in common there mentioned referred to the right to occupy, use, and enjoy the lands in common with the government, and had no relation to the legal title."

Furthermore, counsel seem to overlook the language cited by themselves in *Beecher* v. *Wetherby*, as follows (Appellees' Brief, p. 48):

*"The grantee, it is true, would take only the naked fee, and that could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States."*

Appellees make the argument that the Great Lakes were not included in the grant from the United States to the Indians in and by the Greenville Treaty (Appellees' Brief, p. 44, *et seq.*), because of the expression "westward and southward of the Great Lakes," even though "according to the boundary line agreed on by the United States and the King of Great Britain in the Treaty of Peace made between them in the year 1783." They seem to concede that the islands and the lakes were relinquished to the Indians. *This at least is a recognition of the Indian title in that part of the lands in question which was formerly an island.*

Appellees' argument is, however, answered in appellants' brief, Nos. I and II, p. 41-54.

Appellees' contention is that the word "lands" as used in the Greenville Treaty does not include submerged lands, but the same word used in the treaty of October 27, 1832 (Appellees' Brief, p. 52, *et seq.*), does include submerged lands. Both of these contentions certainly cannot stand. If the contention as to the later treaty is correct, then it inevitably follows that the relinquishment by the Greenville Treaty of all the "lands" northwest of the river Ohio included the submerged lands. But

it does not from that construction follow that the submerged lands were re-ceded by the later treaty, as we have pointed out in our brief. The former contention is certainly inconsistent with the very language of the portion of the Greenville Treaty by them cited (p. 45), that the "Indian tribes will allow to the people of the United States a free passage by land *and by water*" and that they will give them "the free use of the harbors and mouths of rivers," etc. Even the recognition of title to this much of the bed of the lakes would answer our purpose in this case. This was evidently language intelligible to the Indians, giving to the United States the right of navigation over the Great Lakes, but whether so or not, it is merely a circumstance which should be considered with all others, which are very clear, as indicated in appellants brief, pp. 41-54.

The effect of the above Tippecanoe Treaty of 1832 is by us commented on at pages 171-174 of our brief.

Counsel quote language from *Crews* v. *Burcham*, 1 Black 352, wherein the court, in its statement of the case, said:

> "By the Treaty of 1832 the Pottawatomie Indians ceded to the United States *all* their lands in Illinois, Indiana and Michigan south of the Grand river."

The inclusion of the word "all' by the court is an inadvertence, as it does not appear in the treaty; but if it were not, it could not be said that the statement by the court was intended to amend the treaty itself. That cannot be done (Appellants' Brief, p. 175). Nothing of the kind is decided by the case it-

self. This clause in the treaty, however, can hardly mislead anyone. (See Appellants' Brief, pp. 171-174).

On page 55 of their brief, appellees claim that the acts of the government indicate the manifest purpose to terminate the Indians' rights in the territory. Our views on this contention are presented on pages 88-90 of our brief.

Appellees seem to still adhere to the theory that the State of Illinois, by the mere fact of its admission into the union, acquired title to the submerged lands of Lake Michigan; and cite *Shively* v. *Bowlby*, 152 U. S. 1; *Martin* v. *Waddell*, 16 Pet. 367, and *Illinois Central Railroad Company* v. *Illinois*, 146 U. S. 387. The first named case itself is against appellees' contention, as manifested by the following language appearing in it (page 58):

> "The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant for appropriate purposes titles or rights in a soil below high water mark of tide waters."

This was done in the Greenville Treaty, before the admission of Illinois as a state.

For further comment on this subject, we refer to pages 160-164 of our brief.

Respectfully submitted,

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J. G. Grossberg,
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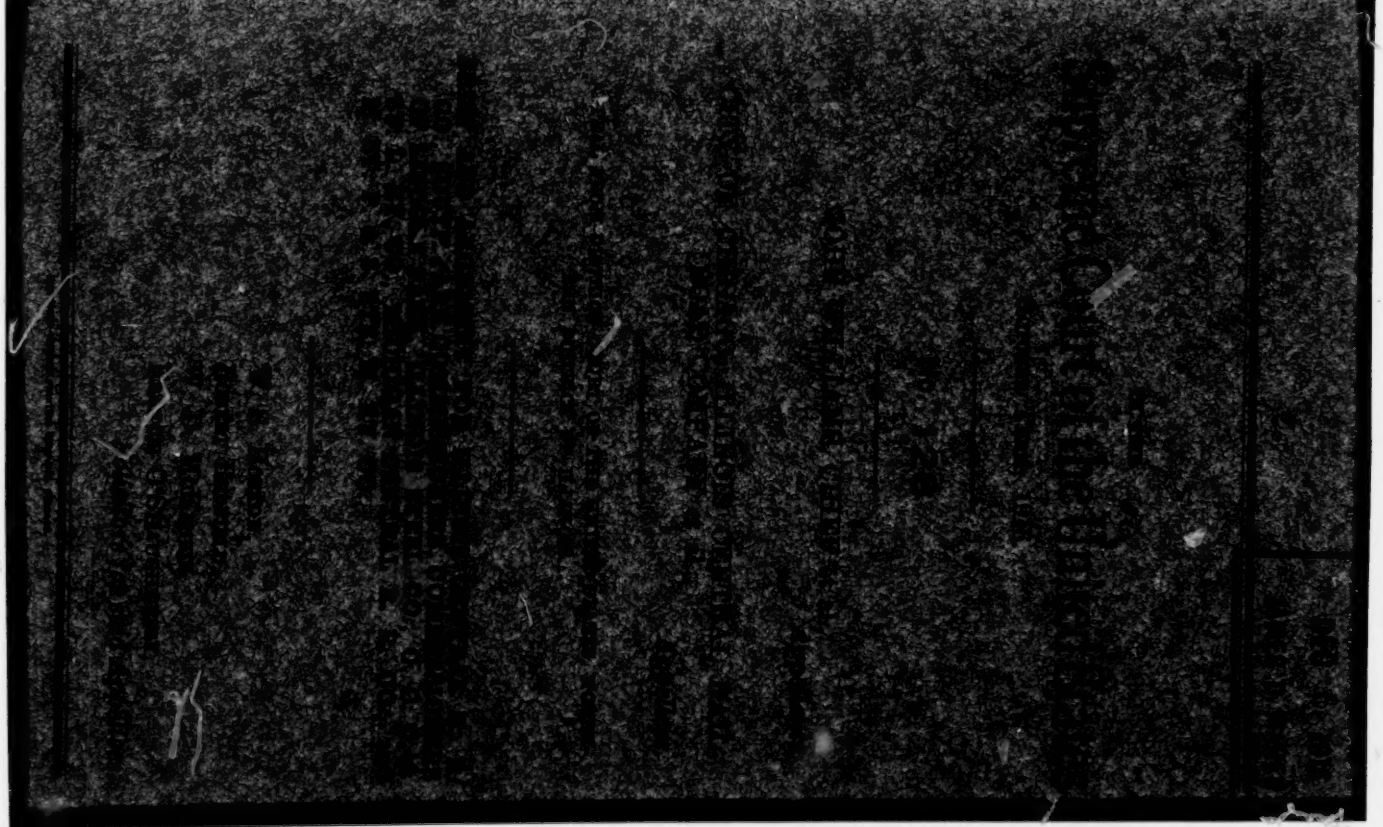

## TABLE OF CONTENTS.


| | Page |
|---|---|
| STATEMENT OF FACTS | 1-6 |
| BRIEF | 7-15 |
| The parties, defect in | 7-8 |
| Remedy at law exists | 9 |
| Laches | 10 |
| The merits | 10-15 |
| ARGUMENT | 16-58 |
| Necessary parties | 16-24 |
| A remedy at law exists | 24-31 |
| Laches of complainants | 31-34 |
| The merits | 34-59 |
| Indian title prior to Treaty of 1795 | 35-43 |
| Title to vacant lands, tide waters and Great Lakes | 39-43 |
| Title not granted by treaty August 3, 1795 | 43-48 |
| All Indian rights in Illinois re-ceded by subsequent treaties | 48-55 |
| The Court will not sustain a claim contrary to the manifest intention and purpose of the United States to terminate Indian rights in the territory in question | 55-56 |


## ALPHABETICAL INDEX TO CASES CITED.


| | Page |
|---|---|
| Act of Congress, March 3, 1871; Fed. Stats. Vol. 3, p. 357 | 15 |
| Beebe *v.* United States (Dak.), 11 N. W., 505 | 13 |
| Beecher *v.* Wetherby, 95 U. S., 517 | 12, 47 |
| Blackfeather *v.* United States, 190 U. S., 368 | 7, 19 |
| Bliss *v.* Kennedy, 43 Ill., 67 | 9, 29 |
| Bruschke *v.* Nord Chicago, etc., Verein, et al, 145 Ill., 433 | 8 |
| Cherokee Nation *v.* Georgia, 5 Pet., 1 | 8, 11, 12 |
| Cherokee Nation *v.* Hitchcock, 187 U. S., 294 | 7 |
| Cherokee Trust Funds, 117 U. S., 288 | 7, 21, 24 |
| Choate *v.* Trapp, 224 U. S., 665 | 7, 15, 20, 56 |
| Crews *v.* Burcham, 1 Black, 352 | 14, 53 |
| Doe *v.* Wilson, 23 How., 457 | 14, 53 |
| Ellis *v.* Davis, 109 U. S., 485 | 9 |
| Elmendorf *v.* Taylor, 10 Wheat., 152 | 10 |

Farwell *v.* Great Western Telegraph Co., 161 Ill., 522..... 8
Felix *v.* Patrick, 145 U. S., 317.....10, 33
Fellows *v.* Blacksmith, 19 How., 366..... 7
Fleming *v.* McCurtain, 215 U. S., 56.....7, 8, 18, 24
Franklin *v.* Lynch, 233 U. S., 269..... 7
Frost *v.* Spitley, 121 U. S., 552..... 9, 27

Gay *v.* Thomas (Okl.), 46 Pac., 578..... 13
Green *v.* Hedenberg, 159 Ill., 489..... 8
Gritts *v.* Fisher, 224 U. S., 640..... 7, 22

Hall *v.* Law, 102 U. S., 461..... 10
Holden *v.* Joy, 17 Wall., 211..... 8

Illinois Central R. R. Co. *v.* Illinois, 146 U. S., 387.....11, 42
In re Celestine (D. C.), 114 Fed., 551..... 8

Johnson *v.* M'Intosh, 8 Wheat., 543.....11, 35, 56
Jones *v.* Meehan, 175 U. S., 1..... 12

Kindred *v.* Union Pacific Ry. Co., 168 Fed., 648.....15, 55
Kreuger *v.* Schultz (N. Dak.), 70 N. W., 269..... 13

Livingston County, &c. Association *v.* Keach, et al, 219 Ill., 9..... 9, 29
Lone Wolf *v.* Hitchcock, 187 U. S., 553.....15, 55

Martin *v.* Waddell, 16 Pet., 367.....11, 12, 40, 45
McGuire *v.* Pensacola City Co., et al, (C. C. A. 5th Ct.), 105 Fed., 677 9, 26
Mitchel *v.* United States, 9 Pet., 711.....11, 37
M. K. & T. Ry. Co. *v.* Roberts, 152 U. S., 114.....13, 15, 55
Myers *v.* Mathis (Ind. Ter.), 46 S. W. 178..... 7, 13

Parker *v.* Shannon, 114 Ill., 192..... 9
Phineas Pam-To-Pee *v.* United States, 148 U. S., 691.....7, 14, 17
Porter *v.* Armour & Co., 241 Ill., 145..... 9

Sac and Fox Indians *v.* Sac and Fox Indians, 220 U. S., 481..... 7, 20
Schrimpscher *v.* Stockton, 183 U. S., 290.....10, 32
Shively *v.* Bowlby, 152 U. S., 1.....11, 12, 39, 45
Smyth *v.* N. O. Canal, &c. Co., 141 U. S., 656..... 9, 27
Stephens *v.* Cherokee Nation, 174 U. S., 445.....7, 15, 56
Stolp *v.* Hoyt, 44 Ill., 219..... 9
Swan Land & Cattle Co. *v.* Frank, 148 U. S., 603..... 8

Thebo *v.* Choctaw Tribe (C. C. A. 8th Ct.), 66 Fed., 372..... 8
Treaty of August 3, 1795.....12, 18, 43, 45-46, 57
Treaty of August 24, 1816.....48-49
Treaty of July 29, [illegible]29..... 49
Treaty of October 20, 1832.....49-50
Treaty of October 27, 1832..... 50
Treaty of September 26, 1833.....23, 50-51
Treaty of September 27, 1833..... 51

United States *v.* Arrendondo, 6 Pet., 691 ..... 12
United States *v.* Bitter Root Development Co., 200 U. S., 451 ..... 9, 28
United States *v.* Cook, 19 Wall., 591 ..... 11, 12, 38, 43
United States *v.* Martin, 14 Fed., 817 ..... 13
United States *v.* New York Indians, 173 U. S., 464 ..... 7
United States *v.* Rauscher, 119 U. S., 407 ..... 13
United States *v.* Reynes, 9 How., 127 ..... 13
United States *v.* Rogers, 4 How., 567 ..... 11, 13
United States *v.* Schooner Peggy, 1 Cranch., 37 ..... 13

Veale *v.* Maynes, 23 Kas., 1 ..... 13

Washburn's Appeal, 105 Pa. St., 480 ..... 9, 30
Whitehead *v.* Shattuck, 138 U. S., 146 ..... 9
Worcester *v.* State of Georgia, 31 U. S., 515 ..... 13, 56

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APPEAL FROM DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

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## BRIEF AND ARGUMENT FOR APPELLEES.

(Note.—The failure herein to note more fully the argument for appellants is because the near approach of the hearing has made it necessary to prepare this brief before the receipt of the brief for them.)

This is an appeal from a decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered May 4, 1914, sustaining motions of the defendants to dismiss the bill of complaint as amended, and dismissing it. (Rec., 38.) Each defendant filed its separate motion, assigning many reasons apparent on the bill's face, of which that by the Illinois

Central Railroad Company (Rec., 35-8) is a fair sample. All the points here raised are made there.

The bill is by complainants, who describe themselves as "Members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians *residing in the State of Michigan.*" (Rec., 1.) They represent that they bring the action "on behalf of themselves and of all members of the Pokagon Band of Pottawatomie Indians, and all other members of the Pottawatomie Nation of Indians, if any are entitled to join herein with them, and of all others, if any, who are entitled to join herein with them." But though the recitals of the bill show the title claimed, if any, is in the Pottawatomie Nation of Indians, no attempt is made to explain the absence of that Nation or tribe as a party, nor are any facts stated to justify complainants' action in its behalf.

The claim of the bill is that from time immemorial preceding August 3, 1795, when the treaty of Greenville, hereafter mentioned, was consummated, the Pottawatomie Nation of Indians were the owners and in possession "as a sovereign and independent nation," of large tracts of land around and along the shores of Lake Michigan.

"South of a line running through the North of the Milwaukee River in the now State of Wisconsin, and the mouth of the Grand River in the now State of Michigan extending said line east and west of said two points, and *including all of Lake Michigan which is south of said line.*" (Rec., 2.)

It is averred that by the treaty of Greenville the United States relinquished their claims to all Indian lands, other than those enumerated in said treaty as ceded to the United States, which lay northward of the river Ohio, eastward of the Mississippi,

"*and westward and southward of the Great Lakes* and the waters uniting them, according to the boundary line

agreed on by the United States and the King of Great Britain, in the treaty of peace made between them in the year 1783" (Rec., 2.),

which relinquishment is charged to have included the lands and country "of the said Pottawatomie Nation," except as by the treaty ceded to the United States. Certain articles of the treaty are recited, including Article V (Rec., 3), which explains the meaning of the relinquishment made by the United States. While that article marks the absence of intention of the United States to vest in the nations or tribes of Indians either the ownership or the sovereignty of Lake Michigan or its submerged lands, the bill asserts that all such lands within the geographical limits of the State of Illinois "have remained and still are the property *of these complainants*" (Rec., 5), which they are "at liberty to occupy, sell, lease or otherwise dispose of *as their own lands in fee simple* without let or hindrance from the United States or any one else." (Rec., 6.)

The bill denies that at the time of the admission of the State of Illinois into the Union, the United States had title to any of such lands; and asserts that by that admission the State of Illinois acquired no title, and that no firm, person or corporation, municipality or other, has any power over or authority to dispose of any part thereof, or to occupy or seize the same without the consent of "these complainants." But it is charged that the City of Chicago passed an ordinance July 31, 1913, in relation to the establishment of a harbor district in said lake, and that it will proceed so to do, unless restrained by the court (Rec., 6-7); that on February 10, 1851, the State incorporated the Illinois Central Railroad Company, and authorized it to locate and construct its railroad, but not in cities without the consent of the Common Council; that the City of Chicago adopted an ordi-

nance June 14, 1852, authorizing that Company "to fill in portions of Lake Michigan which were and are the property of your orators, and without the consent of your orators, and the defendant, the Illinois Central Railroad Company, did seize and fill in portions of said Lake Michigan, in pursuance of such purported authority by the Act of the State of Illinois and the ordinances of the City of Chicago last named, *and has ever since then held and occupied the same* without the consent of these complainants or of the Pottawatomie Nation." (Rec., 7.) Many other Acts of the Illinois General Assembly are averred (Rec., 8)—all of which, however, show continuous exercise of jurisdiction and authority by the State.

It is averred that in 1833, the Pokagon Band was a component part "*of the larger body or nation of Pottowatomie Indians* named in the said treaty of Greenville, and in subsequent treaties with the Government"; that in that year, the Pottawatomie Nation became divided, and that portion thereof not belonging to the said Pokagon Band migrated to a new country west of the Mississippi River,

"leaving the said Pokagon Band in possession, occupancy and control and in sovereignty *of whatever territory then remained unceded* by the said Pottawatomie nation to the United States of the original land or country of the said Pottawatomie nation, and title in and to and control and sovereignty—the same has remained in the said Pokagon Band to the present time except and unless as affected by the aforesaid deed to William H. Cox." (Rec., 9.)

The prayer is that the defendants may be enjoined from making any other seizures of the "lands of the complainants" during the pendency of the suit and "until the rights of the complainants in the premises can be fully adjudged and established"; that each of the defendants "be compelled to wholly remove therefrom

and from every part thereof, and that they and each of them be perpetually enjoined and barred from setting up or asserting any claims, title or interest in or to such lands, or any part of them"; that the several statutes of the State and the ordinances named be declared void; that each of the defendants be required to account and pay the complainants a reasonable compensation for the use and occupancy of the lands for the period during which occupied, and that

"the title *of these complainants* in and to such several lands may be quieted, established and confirmed in accordance with the provisions of said treaty." (Rec., 11.)

The bill, in short, is by certain individuals forming a Business Committee of the Pokagon Band, who claim the sovereignty over and ownership of all that part of Lake Michigan opposite the City of Chicago, but who aver they reside in the State of Michigan. They base their claim, in part, upon an assertion that the "Pottawatomie Nation of Indians" (Rec., 2) were the owners and in possession and occupancy as a sovereign and independent nation from time immemorial preceding the making of the treaty of August 3, 1795, of the described lands and part of Lake Michigan, and, in part, upon the treaty of that date, which, the bill avers, the United States made with the "Pottawatomie Nation of Indians" (Rec., 2); but no facts are averred to warrant an assumption of title either in the complainants or the Pokagon Band, or to explain the failure of the Pottawatomie Nation, as a nation or tribe, to bring the suit, or to justify complainants in bringing it.

It is not averred in the bill that the complainants are members of any tribe, or that even the Pokagon Band maintains its tribal relation. It is not charged that they are not citizens of the United States, or that they are

now, or have been, under any disability to assert in court the rights claimed. No word of excuse is offered for failure to assert a sovereignty and ownership which has been consistently ignored by the Government of the United States, the State of Illinois, and all municipalities and owners of lands along Lake Michigan for more than seventy-five years past.

The defects in the bill are specified in the motions to dismiss. The District Court, after a patient hearing, sustained the motions. The decree entered was in accordance with the facts shown in the bill and the laws and treaties of which the court takes cognizance.

# BRIEF.

## I.

### THE PARTIES.

The bill does not show right in complainants, either personally or as the Chief and Business Committee of the Pokagon Band, to maintain the suit. Whatever title exists in the Indians is in the Pottawatomie tribe or nation.

7 Stats. at Large, p. 49.

*Phineas Pam-To-Pee* v. *United States*, 148 U. S., 691, 705.

*Fleming* v. *McCurtain*, 215 U. S., 56, 61, 63.

*Sac and Fox Indians* v. *Sac and Fox Indians*, 220 U. S., 481, 483, 487, 489.

*Blackfeather* v. *United States*, 190 U. S., 368, 377.

*Choate* v. *Trapp*, 224 U. S., 665.

*Stephens* v. *Cherokee Nation*, 174 U. S., 445.

*United States* v. *New York Indians*, 173 U. S., 464.

*Franklin* v. *Lynch*, 233 U. S., 269, 271.

*Myers* v. *Mathis* (Ind. Ter.), 46 S. W., 178.

*Cherokee Nation* v. *Hitchcock*, 187 U. S., 294, 307.

*Gritts* v. *Fisher*, 224 U. S., 640, 642.

*Cherokee Trust Funds*, 117 U. S., 288, 308, 311.

None of the treaties mentioned in the bill were made with the Pokagon Band, but with certain large Indian tribes or nations, including the Pottawatomies. The parties to treaties are those named therein.

*Fellows* v. *Blacksmith*, 19 How., 366.

*United States* v. *New York Indians*, 173 U. S., 464, 469.

But not only is the tribe with which the treaties were made not a party, but no facts are stated to justify the suit by the complainants, even if still members of the tribe—a condition not averred. The right to maintain this suit can be no stronger than that of an individual stockholder to maintain a bill in behalf of the corporation. He must aver refusal by the company to act, or other excuse, and make the company a party, so that all rights may be adjudicated.

*Bruschke* v. *Nord Chicago, etc. Verein, et al.*, 145 Ill., 433, 445.

*Green* v. *Hedenberg*, 159 Ill., 489.

*Farwell* v. *Great Western Telegraph Co.*, 161 Ill., 522, 606, 610.

If the title is in the Pottawatomie tribe or nation, it is a necessary party.

*Swan Land & Cattle Co.* v. *Frank*, 148 U. S., 603, 611.

Moreover, if the Pottawatomie Indians no longer maintain their tribal relation, their rights under the treaties are at an end. If the tribal relation is maintained, authority in these complainants to sue for or on behalf of the tribe or nation should be averred.

*Holden* v. *Joy*, 17 Wall., 211, 242.

*Cherokee Nation* v. *Georgia*, 5 Pet., 1, 19, 20.

*Thebo* v. *Choctaw Tribe* (C. C. A., 8th Ct.), 66 Fed., 372, 373, 375.

*In re Celestine* (D. C.), 114 Fed., 551, 552.

*Fleming* v. *McCurtain*, 215 U. S., 56, 61.

## II.

### A REMEDY AT LAW EXISTS.

While the complainants ask for injunctive relief, it is incidental to, and dependent upon, the establishment of their right in the lands. In such cases the right must first be established at law. The bill, in different paragraphs, shows the defendants in possession of lands as an appurtenance to which they propose to further fill in the lake. The prayer of the bill is that the title of the complainants may be quieted, established and confirmed. But upon such showing of possession of the lands by the defendants, a bill for that purpose cannot be maintained.

*McGuire* v. *Pensacola City Co., et al.* (C. C. A., 5th Ct.), 105 Fed., 677, 680.

*Livingston County etc. Association* v. *Keach*, 219 Ill., 9, 11.

*Porter* v. *Armour & Co.*, 241 Ill., 145, 151.

*Parker* v. *Shannon*, 114 Ill., 192, 195.

*Stolp* v. *Hoyt*, 44 Ill., 219.

*Bliss* v. *Kennedy*, 43 Ill., 67, 75.

*United States* v. *Bitter Root Development Co.*, 200 U. S., 451.

*Ellis* v. *Davis*, 109 U. S., 485, 493.

*Smyth* v. *N. O. Canal, etc. Co.*, 141 U. S., 656.

*Frost* v. *Spitley*, 121 U. S., 552, 556.

*Whitehead* v. *Shattuck*, 138 U. S., 146, 151.

*Washburn's Appeal*, 105 Pa. St., 480, 482.

## III.

### LACHES.

The United States and the States of which Lake Michigan is a part have for more than one hundred years exercised full sovereignty and jurisdiction over Lake Michigan. The municipalities and owners of land bordering upon it in Illinois have long asserted ownership of reclaimed lands, and by various Acts of the legislature title has been vested in them. The complainants bring this suit as matter of right and make no pretense that they are not citizens, or that they are, or have been under disability to earlier bring the action. They do not claim either that their Band, or that the Pottawatomies, maintain the tribal relation. They claim an absolute title and not one in subserviency to the United States. Under the conditions shown, the rule of laches applies.

*Schrimpscher* v. *Stockton,* 183 U. S., 290, 296.
*Elmendorf* v. *Taylor,* 10 Wheat., 152.
*Hall* v. *Law,* 102 U. S., 461.
*Felix* v. *Patrick,* 145 U. S., 317, 329.

## IV.

### THE MERITS.

The complainants assert two sources of title: (1) that the Pottawatomie Nation of Indians were the owners and in possession and occupancy as a sovereign and independent nation from time immemorial preceding the treaty of August 3, 1795 (Rec., 2); and (2) the treaties from time to time made with the Pottawatomie Nation. Neither claim is well founded. The Indians did not have the ownership of, or sovereignty over, Lake Mich-

igan, when the treaty of August 3, 1795, was made; they were not given it by that treaty; and whatever rights in the lands bordering upon the Lake were given them were afterwards receded to the United States by the subsequent treaties.

(1) This court has frequently decided that the United States, like the British Government before it, holds the sovereignty and the ultimate title to all lands occupied by the Indians within the geographical limits of this country; and that the Indian right is that of mere occupancy which the Government may extinguish either by purchase or conquest.

*Johnson* v. *M'Intosh*, 8 Wheat., 543, 573, 584, 586, 587, 588.
*Mitchel* v. *United States*, 9 Pet., 711, 745.
*United States* v. *Cook*, 19 Wall., 591, 592.
*Shively* v. *Bowlby*, 152 U. S., 1, 14.
*Martin* v. *Waddell*, 16 Pet., 367, 409, 410.
*United States* v. *Rogers*, 4 How., 567, 571.
*Cherokee Nation* v. *State of Georgia*, 5 Pet., 1, 48.

In harmony with the above, it is held that upon the discovery of this country the title to the waters and unoccupied lands vested in the King of England, and subsequently in the United States.

*Shively* v. *Bowlby*, 152 U. S., 1, 14, 57.
*Martin* v. *Waddell*, 16 Pet., 367, 409, 410, 416.

And the same rule which places in the Government the absolute title and right to possession of tide waters and the lands thereunder, applies equally to the Great Lakes.

*Illinois Central R. R. Co.* v. *Illinois*, 146 U. S., 387, 434, 435.

The court, moreover, will take notice that whatever of occupancy the Indian tribes had of the waters or sub-

merged lands of Lake Michigan in question, has long been abandoned; that they have not occupied even the adjoining lands for more than seventy-five years. When there is an abandonment by the Indians of occupied territory, their rights therein cease.

*United States* v. *Cook*, 19 Wall., 591, 593.
*Cherokee Nation* v. *Georgia*, 5 Pet., 1, 16.
*United States* v. *Arrendondo*, 6 Pet., 691, 746.

(2) The treaties upon which complainants rely do not cede the Great Lakes to the Indians. The description of the territory relinquished by the United States is of "Indian lands" "westward and southward of the Great Lakes and the waters uniting them."

7 U. S. Stats. at Large, p. 51, Art. 4.
*Shively* v. *Bowlby*, 152 U. S., 1, 13.
*Martin* v. *Waddell*, 16 Pet., 367, 411.

And not only so, but by the treaty of August 3, 1795, the Indians agreed to allow the people of the United States free passage by land and by water through their country along the chain of posts mentioned. The description of the routes of travel does not include the Great Lakes, but harbors and rivers reached or starting from the Lakes, thus indicating that the possession of and sovereignty over the Lakes remained in the United States.

7 U. S. Stats. at Large, p. 50.

Moreover, the cessions to the Indians were to them as tribes and did not give any other or different character of title than the Indians previously had, namely, that of occupancy.

Treaty of August 3, 1795 (7 U. S. Stats., 50-52).
*Beecher* v. *Wetherby*, 95 U. S., 517, 525.
*Jones* v. *Meehan*, 175 U. S., 1, 8.

*Veale* v. *Maynes*, 23 Kas., 1, 19, 25.
*M. K. & T. Railway Co.* v. *Roberts*, 152 U. S., 114, 116.
*United States* v. *Rogers*, 4 How., 567, 572.

The complainants rely upon the treaty of August 3, 1795, but an examination of it discloses no intention on the part of the United States to relinquish to the Indian tribes any other title than that of occupancy, and none whatever in the waters of Lake Michigan or its submerged lands. The relinquishment was of "Indian lands," which were described as "westward and southward of the Great Lakes"; and all those lands were subsequently re-ceded to the United States by treaties of which the court will take judicial notice.

*Worcester* v. *State of Georgia*, 31 U. S., 515.
*United States* v. *Schooner Peggy*, 1 Cranch., 37, 40.
*United States* v. *Reynes*, 9 How., 127, 147.
*Myers* v. *Mathis* (Ind. Ter.), 46 S. W., 178.
*Kreuger* v. *Schultz* (N. Dak.), 70 N. W., 269.
*Beebe* v. *United States* (Dak.), 11 N. W., 505, 510.
*Gay* v. *Thomas* (Okl.), 46 Pac., 578, 583.
*United States* v. *Martin*, 14 Fed., 817.
*United States* v. *Rauscher*, 119 U. S., 407, 418.

Among such treaties are those made August 24, 1816 (7 U. S. Stats. at Large, p. 146); August 19, 1825 (7 U. S. Stats. at Large, p. 272); October 16, 1826 (7 U. S. Stats. at Large, p. 295); July 29, 1829 (7 U. S. Stats. at Large, p. 320); October 20, 1832 (7 U. S. Stats. at Large, p. 378); October 27, 1832 (7 U. S. Stats. at Large, p. 399); September 26, 1833 (7 U. S. Stats. at Large, p. 431); September 27, 1833 (7 U. S. Stats. at Large, p. 442); February 8,

1831 (7 U. S. Stats. at Large, p. 342); June 5th and 17th, 1846 (9 U. S. Stats. at Large, p. 853); November 15, 1861 (12 U. S. Stats. at Large, p. 1191);

Numerous other treaties with Chiefs of the Pottowatomie Nation, to whom had been given particular tracts of land in this territory, under prior treaties were made under dates of December 4, 1834, December 10, 1834, December 17, 1834, March 26, 1836, March 29, 1836, April 11, 1836, April 22, 1836, August 5, 1836, September 20, 1836, September 22, 1836, September 23, 1836, whereby the particular Indians relinquished their possessions and agreed to move within the limited time to the territory provided for the Pottawatomie Indians west of the Mississippi River. Practically all of these treaties provide for the payment of large sums of money, not only to bear the expense of removal, but to purchase particular equities or interests found to exist. They evidence the detail and care with which the Federal Government secured formal relinquishment of all Indian rights in this territory. It is clear from them that whatever rights were ceded to the Indians by the treaties cited by complainants in their bill were subsequently re-ceded to the United States. And it has been so held.

*Phineas-Pam-To-Pee* v. *United States*, 148 U. S., 691.

*Crews* v. *Burcham*, 1 Black., 352.

*Doe* v. *Wilson*, 23 How., 457, 461.

The continuous exercise of sovereignty and acts of ownership over the waters of the Great Lakes, together with the recession to the United States of all the "Indian lands" covered by the earlier treaties, is consistent only with a purpose to free all this territory from Indian claims. Any recognition of sovereignty over or ownership of Lake Michigan or its submerged lands will be

utterly inconsistent with the Government's policy, the treaties and the repeated decisions of this court.

*Lone Wolf* v. *Hitchcock*, 187 U. S., 553, 565.

Act of Congress, March 3, 1871; Fed. Stats., Vol. 3, p. 357.

*Stephens* v. *Cherokee Nation*, 174 U. S., 445, 483.

*Choate* v. *Trapp*, 224 U. S., 665, 671.

*M. K. & T. Ry.* v. *Roberts*, 152 U. S., 114, 116.

*Kindred* v. *Union Pacific Ry. Co.*, 168 Fed., 648, 652.

## ARGUMENT.

### I.

THE NECESSARY PARTIES.

The bill avers a title in the Pottawatomie Nation of Indians, but the suit is by individuals. The treaty of August 3, 1795, given as one source of title, is alleged to have been made with the Pottawatomie Nation or tribe. It was in fact made between the United States of America "and the tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-River, Weea's, Kickapoos, Piankashaws and Kaskaskias." (7 U. S. Stats. at Large, p. 49.) Another claimed source of title is the alleged ownership possession and occupancy of "the said Pottawatomie Nation of Indians" (Rec., 2) as a sovereign independent nation. It is that tribe or nation which the bill avers was the owner of the lands and water in question, prior to the treaty, and the grantee under its terms. The suit, however, is by "John Williams, Chief, Michael Williams, Secretary, Thomas Topash, Chairman Business Committee, Isaac Augusta, Frank Sawalk, Arthur A. Lexis, Lewis Baziel, and Stephen Topash, members of Business Committee of the Pokagon Band of the Pottawatomie Nation of Indians, residing in the State of Michigan." (Rec., 1.) They allege that they bring the action "on behalf of themselves and of all members of the Pokagon Band of Pottawatomie Indians, and of all other members of the Pottawatomie Nation of Indians, *if any* are entitled to join herein with them, and of all others, *if any*, who are entitled to join herein with them."

The bill not only omits the Pottawatomie Nation or

tribe as a party and fails to sue for or on its behalf, but in paragraph 24, after averring that until the year 1833, the Pokagon Band of the Pottawatomie Nation was a component part "of the larger body or nation of Pottawatomie Indians named in the said treaty of Greenville and in subsequent treaties with the Government of the United States," and "that in the last named year the said Pottawatomie Nation became divided, and *that portion thereof not belonging to the said Pokagon Band* migrated to a new country or territory west of the Mississippi River, under and in pursuance of a treaty with the Government of the United States" (Rec., 9), it is averred that the said Pokagon Band was left in possession, occupancy, control and sovereignty of whatever territory *then remained unceded* by the Pottawatomie Nation to the United States, and that the title "has remained in the said Pokagon Band to the present time" except as affected by a deed alleged to have been given William H. Cox. The prayer is that the title be quieted in them. In short, the bill, after averring title in the Pottawatomie Nation, seeks to have established an individual ownership, or, at the most, title in the Pokagon Band.

It is apparent from the treaty of August 3, 1795, that the cession made by the United States was not to the individual members of tribes, or to some particular Band, but to the Pottawatomie Indians as a whole.

In *Pam-To-Pee et al.* v. *United States*, 148 U. S., 691, Mr. Justice Shiras thus explained the parties to these treaties:

"In some of the treaties, various tribes united with the Pottawatomies, but the tribes were recognized by the government as being distinct from one another, and their respective rights and duties under the treaties were therein defined and set forth. In others the Pottawatomie Indians were included in the tribe designated as the 'United Nation of Chippewa, Ottawa and Pot-

tawatomie Indians,' but the government seems to have dealt with the United Nation as though it were identical with the Pottawatomie tribe, and we shall so consider it in the present case."

Moreover, in Article V of the treaty of August 3, 1795, it is recited that in order to prevent any misunderstanding about the Indian lands relinquished by the United States, it is declared that the meaning of that relinquishment is this:

"*The Indian tribes* who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but *when those tribes*, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States." (7 U. S. Stats. at Large, p. 52.)

Thus, not only was the treaty made with the nation or tribe, but in that instrument is the explanation that the relinquishment is to the "tribes," with the restriction that none of them shall dispose of any part of the lands except to the United States. The individual Indians are by the very terms of the treaty prevented from acquiring title.

In *Fleming* v. *McCurtain*, 215 U. S., 56, a bill in equity purported to be brought by and on behalf of some 13,000 persons "all persons of Choctaw or Chickasaw Indian blood and descent and members of a designated class of persons for whose exclusive use and benefit a special grant was made" of certain property in Oklahoma. The bill was demurred to for want of equity. The principal controversy was over the grant and letters patent issued in pursuance of the treaty of Dancing Rabbit Creek of September 27, 1830 (7 Stat., 333) conveying a tract described to the Choctaw Indians in fee simple, and to their descendants to inure to them while they should exist as a nation and live thereon. It was held that the grant did not create a trust for the individuals then compris-

ing the nation and their respective descendants. Among other things, the court said (p. 61):

"What we have said shows another sufficient answer to the plaintiffs' claim. They say and argue, as they must in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as nations. But if so, the grant also was at an end when the nations ceased to be, and it rested with the bounty of the United States to decide what should be done with the land, except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely."

And again, it is said (p. 63):

"Neither do the plaintiffs claim under any title to be derived from the statute providing for distribution according to the rolls of citizenship. They do not allege that they are citizens or attempt to bring themselves within any grant later than the treaty and patent that we have discussed."

In *Blackfeather* v. *United States*, 190 U. S., 368, the court considered the jurisdiction of the Court of Claims under the Act of October 1, 1890, to determine the rights in law or equity of the tribes of the Shawnee and Delaware Indians, and denied the jurisdiction to determine the rights of individual members of the tribes, and in the course of the opinion approved the following remarks of the Court of Claims (p. 377):

"The attention of the court is called to the fourteenth article (of the treaty of 1854), which provides that 'The Shawnees acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations, and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected and to have their rights vindicated.' Does this phraseology establish contractual or treaty relations, having the effect of contracts, with each individual Indian composing the Shawnee tribe? Or, rather, is it not a general clause, limited in its effect to the parties to the treaty, to wit, the United States on one side and the Shawnee tribe upon the other?

The plaintiff, by the allegations of the petition, has asserted an individual obligation existing between the United States and each of the claimants, and in order to recover it must appear that such a relation exists.

The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either express or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians."

The case of *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma et al.*, 220 U. S., 481, was commenced under the Act of March 1, 1907, 34 Stat., 1055, giving to the Court of Claims full legal and equitable jurisdiction of all claims of the plaintiffs against the defendants for their alleged "proportionate shares according to their numbers" not already paid to them, of appropriations for fulfilling treaty stipulations. The Iowa Indians contended that they had not received their share of the annuities. The court referred to the character of title given the Indians by the various treaties, saying (p. 483):

"We interrupt the recital of facts to dispose at this point of the first claim made by the plaintiffs. The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S., 379, 387. The Government did not deal with individuals, but with tribes. *Blackfeather* v. *United States*, 190 U. S., 368, 377. See *Fleming* v. *McCurtain*, 215 U. S., 56. The promises in the treaties under which the annuities were due were promises to the tribes."

And in concluding, it was said (p. 489):

"The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members."

In *Choate* v. *Trapp*, 224 U. S., 665, the court, in considering the tax exemption of Indian lands allotted

under the Curtis Act of June 28, 1898, 30 Stat., 505, thus stated the title of the individual Indians in lands held by or ceded to a tribe (p. 671):

"The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had not acquired rights under the Curtis Act which are now protected by the Constitution of the United States.

*The individual Indian had no title or enforcible right in the tribal property.* But as one of those entitled to occupy the land he did have an equitable interest, which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled."

In *Cherokee Trust Funds*, 117 U. S., 288, the court, in considering the claim of the Cherokees of North Carolina to a share of a commuted annuity created by sales of land west of the Mississippi River ceded to the Cherokee Nation, held that it was a fund intended for the benefit of the United Nation, and not for those who had separated from it and become aliens to their nation. It was said (p. 308):

"The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sales made of any part of them. He had a right to use parcels of the lands thus held by the Nations, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. Our government, by its treaties with the Cherokees, recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character. Their treaties of cession must, therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members."

It was there held that the Cherokees of North Carolina dissolved their connection with the Nation when they refused to accompany the body of it on its removal, the court saying (p. 311):

"If Indians in that State, or any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation."

In *Gritts* v. *Fisher, etc.*, 224 U. S., 640, suit was begun by three Indian members of the Cherokee tribe on behalf of themselves and all others similarly situated, to determine whether children born to enrolled members after September 1, 1902, and living March 4, 1906, were entitled to enrollment as members of the tribe and to participation in the allotment of its lands and funds. The court referred to the legislation of Congress looking to the distribution of the lands of the five civilized tribes among their respective members and to dissolution of the tribal governments, and said (p. 642):

"Anterior to this legislation the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible."

Other cases are cited in the brief. They refer to other treaties or statutes, but in none of them is the ceded right more directly limited to the tribe or nation than by the treaty of August 3, 1795. Nor do the averments in the twenty-fourth paragraph of the bill (Rec., 9) aid complainants. Indeed, it is there recognized that the

Pokagon Band was only a part of "the larger body or nation of Pottawatomie Indians," and that in the year 1833, that portion of the Pottawatomie Nation not belonging to the said Pokagon Band migrated to a new country west of the Mississippi River, in pursuance of a treaty with the Government of the United States. The averments of that paragraph are to be read in connection with the treaties of August 24, 1816 (7 U. S. Stats., 147), October 20, 1832 (7 U. S. Stats., 378), October 27, 1832 (7 U. S. Stats., 399), September 26, 1833 (7 U. S. Stats., 431), September 27, 1833 (7 U. S. Stats., 442), and so read it will be found that no land in the State of Illinois was left unceded. Not only so, but by the supplementary treaty made September 27, 1833 (7 U. S. Stats., 442), to which the Pokagon Band was a party, it was agreed that the Indians located in Michigan should be a party to the treaty of September 26, 1833, in the last sentence of Article II of which is the provision:

"It being understood, that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately on the ratification of this treaty, but to be permitted to retain possession of the country north of the boundary line of the said State, for the term of three years, without molestation or interruption and under the protection of the laws of the United States."

The bill itself does not aver that the complainants or the Pokagon Band remained in possession of any land in Illinois, and the treaties to which reference is made expressly prohibit them from so doing. Therefore, this suit, brought by individual Indians, who do not aver that they sustain any tribal relations, is not sufficient in parties. It should not be permitted, because an adjudication therein will not be a defense to a suit brought by the Pottawatomie nation or tribe, if authorized to do so.

Moreover, it is not averred that the Pottawatomie Indians maintain their tribal relation, and if not, their

rights in the waters of Lake Michigan and the lands submerged thereby, of which they have had no occupancy or possession, is at an end.

*Fleming* v. *McCurtain,* 215 U. S., 56, 61.

And the Pokagon Band, by failing to remain a part of the Pottawatomie Nation, as well as to occupy the territory now claimed, are without right.

*Cherokee Trust Funds,* 117 U. S., 288, 309.

## II.

### A REMEDY AT LAW EXISTS.

Another objection to the bill is that a remedy at law exists. While the complainants ask for injunctive relief, it is incidental to and dependent upon the establishment of their rights in the lands. The defendants should not be restrained on behalf of these complainants, unless the latter have title, which is the main object of the bill and can be settled by suit at law.

It is averred in paragraph 5 of the bill that the proceeding is brought "for the restoration to the complainants of lands so relinquished by the United States and not included in any cession to the United States" (Rec., 2); in paragraph 16 (Rec., 5), "That many firms, persons and corporations, including the defendants herein named, consisting of citizens of the United States and other white persons, have without the consent of these complainants, or of the Pottawatomie Nations, from time to time seized large tracts of land, both reclaimed, artificially made and others, East, Northeast and North and altogether outside of any of said cessions to the United States"; in paragraph 18 (Rec., 6), that "owing to the acts of the defendants and others above stated, by seizing some of said lands and occupying the same

to the exclusion of these complainants, a cloud has been created upon the title of these complainants in and to said lands and their ability to sell or lease or otherwise dispose of the same, or any parts thereof"; in paragraph 25 (Rec., 9), "that the several defendants hereinafter named above, from time to time under the purported authority of the State of Illinois, and under color of laws and statutes thereof, but without any authority at all and without consent or authority on the part of the Pottawatomie Nation of Indians, or any one claiming by, through or under them, filled in large portions of said Lake Michigan and have settled or threaten to settle upon portions of the same, and have seized and occupied and still continue to occupy them, or threaten to seize or occupy portions of them"; and in paragraph 21, that the Illinois Central Railroad Company was authorized by the City of Chicago, June 4, 1852, "to fill in portions of Lake Michigan which were and are the property of your orators and without the consent of your orators, and the defendant, the Illinois Central Railroad Company, did seize and fill in portions of said Lake Michigan, in pursuance of such purported authority, * * * and has ever since then held and occupied the same." (Rec., 7.)

The prayer for relief, in substance, is, that the defendants may be

"perpetually enjoined and restrained from seizing, occupying or building any structures upon any part of the lands of these complainants above described, whether reclaimed or submerged, and from filling in or reclaiming any such submerged lands lying East, Northeast or North of the boundary lines of cessions to the United States heretofore made, without the consent, permission or authority of these complainants, *and to be compelled to wholly remove therefrom and from every part thereof, and that they, and each of them be perpetually enjoined and barred from setting up or asserting any*

*claims, title or interest in or to such lands, or any part of them;* * * * that they, the said several defendants, and each of them, may be required to account and pay to these complainants a reasonable compensation for the use and occupancy of the said lands for the periods during which such several occupancies have heretofore been had; *that the title of these complainants in and to such several lands may be quieted, established and confirmed in accordance with the provisions of said treaty.*"

In short, the bill avers that the defendants are in possession and seeks by injunctive relief to compel them to give up and surrender the lands and that the title may be quieted and confirmed in complainants. It is not averred that the title has been established at law, but discloses the existence of conditions by which it may be so established. The cases cited in the brief are clear that under the showing thus made the bill is bad.

In *McGuire* v. *Pensacola City et al.* (C. C. A., 5th Ct.), 105 Fed., 677, the bill charged that the complainants had been in the possession of certain real estate, but that the defendants illegally wrested possession from them. The prayer was for an injunction to restrain the defendants from disposing of or interfering with the lands or cutting any streets or trees thereon, or committing any trespass; for an account; that the title be quieted; and complainants' interest and title decree. A demurrer was sustained and the bill dismissed. On appeal, the court, in part, said (p. 679):

"The averments of the bill show that the complainant has the legal title to the land claimed, and that defendants have obtained possession by force, and are now in possession. This makes a plain case for an action of ejectment. If these averments are true—and on demurrer they are presumed to be true—the appellant would be entitled to recover the land in ejectment. Under the seventh amendment to the constitution the defendants in possession have the constitutional right to a trial by jury. No statute of the State of Florida is cited as conferring equity jurisdiction on state courts in cases

like this, and such statutes, if enacted, would not control the equity jurisdiction of the federal courts in a case where to enforce the statute would deprive a party of trial by jury. * * * We do not understand the learned counsel for the appellants as disputing these propositions, but their contention is that the bill contains averments that take the case out of the influence of these well settled rules.

First, it is claimed that the court has jurisdiction to prevent a multiplicity of suits. The federal courts, of course, have jurisdiction in equity, in proper cases, to prevent a multiplicity of suits. But there is nothing alleged in the bill to confer jurisdiction on that account. If the defendants are trespassers, having obtained possession by force and violence, as alleged, they may all be joined as defendants in one action of ejectment. * * * But, even if a number of suits were required to settle the controversy as to the lands, each defendant would have the right to submit his claim of title and right to possession to a jury. * * *

The third contention of the appellant is that the court has jurisdiction 'to quiet title from cloud now resting on it by acts of defendants.' It is well settled that a plaintiff not in possession, having the legal title, cannot maintain a bill against defendants who are in possession to remove cloud from title."

In *Smyth* v. *N. O. Canal and Banking Co.*, 141 U. S., 656, the plaintiff in his bill set up a legal title to real estate derived from the State of Louisiana to which it had been listed as swamp or overflowed lands. He averred that the respondents claimed under certain French grants which had been recognized by the Land Office, and prayed that he might be declared to be the owner and put in possession and have an accounting. It was held that he had a plain, adequate and complete remedy at law, and the bill must be dismissed, the court saying (p. 661):

"The demurrer to the bill was, therefore, properly sustained and the suit dismissed on the ground that the complainant had an adequate remedy at law."

*Frost* v. *Spitley*, 121 U. S., 552, was on a bill alleging complainants were entitled to two lots in Omaha, and

praying for a decree quieting complainants' title. Upon the hearing it was shown that the defendants were in possession. It was said (p. 556):

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. * * * A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment."

In *United States* v. *Bitter Root Development Co.*, 200 U. S., 451, the United States filed its bill to recover from the defendants the value of certain timber alleged to have been wrongfully cut and taken from the public lands. Various grounds for equitable relief were averred, including fraud, conspiracy and violation of trust, and it was urged that a multiplicity of suits would be avoided by the equity jurisdiction. The bill was dismissed, and in affirming the decree, this court, in part, said (p. 471):

"Although there is a liberal use in the bill in this case of averments in regard to fraud, conspiracy and violation of trust, of which the pleader avers the defendants have been guilty, in various ways, yet upon a careful examination of the pleading itself, and the actual facts therein stated, we concur in the view of the courts below, that the action is really nothing but an action of trespass or trover to recover damages sustained by the complainant by reason of the wrongful cutting, carrying away and conversion of the property of the complainant. * * *

It is not necessary to cite many authorities for the proposition that where the main cause of action is of a legal nature, equity has no jurisdiction, provided the complainant has a full and adequate remedy at law for the wrongs complained of."

It was held that no ground for equity jurisdiction was shown, either for fraud, discovery, accounting, or the prevention of a multiplicity of suits. On the latter point it was said (p. 479):

"Nor do we see that there is any jurisdiction on the ground of prevention of a multiplicity of suits. Those persons who were guilty of the wrong must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other. It is not a case where a few defendants may be made parties as representatives of a class holding under or claiming the same title or right, and so that a judgment against the representative defendants may bind all others of the class. There is no class and there can be no representatives."

The Illinois cases are to like effect. In *Bliss* v. *Kennedy et al.*, 43 Ill., 67, which involved claims to water rights, it was said (p. 75):

"Under the circumstances developed by this record the appellants have no right to resort to a court of equity until they shall have established their right at law. To authorize the interposition of chancery by injunction, a writ which may, in its operation, produce incalculable damage to a manufacturer, against the prosecution of whose legitimate business it is required to issue and does issue—justice requires there should be first established not only a clear and palpable violation of the alleged rights of the party complaining, but the rights themselves should be certain, undoubted, and such as have been ascertained by the verdict of a jury, and can be, thereby, clearly ascertained and measured. When the right is thus established, the aid of a court of chancery to protect appellants in the full enjoyment of it will not be invoked in vain."

In *Livingston County, etc., Association* v. *Keach et al.*, 219 Ill., 9, a bill was brought against two adjoining neighbors of complainant, one or the other of whom was alleged to have encroached upon his land. The bill sought to have the boundary line between the owners of the lots

on each side of complainant's property ascertained. It was said (p. 11):

"It is contended that the court erred in not sustaining the bill as a bill to remove a cloud and quiet title, and also for the reason that a resort to equity was necessary to avoid a multiplicity of suits. If the bill were a bill to remove a cloud and quiet title it could not be maintained, for the reason that the complainant was not in possession of the premises in dispute and they were not vacant or unoccupied. * * *

There is no equitable ground for relief to prevent a multiplicity of suits. According to the bill but one of the defendants is wrongfully in possession of the complainant's property, and, with the facts ascertained, but one action is necessary. The equitable jurisdiction is only exercised when legal remedies are inadequate and there is a necessity for the interposition of equity to prevent unnecessary, annoying and harassing suits."

It will be urged in answer that there is involved the question of the ownership of a vast territory claimed by many persons, and that equity, in order to avoid the bringing of many suits to oust the many separate possessors, should take jurisdiction, because, as against them, all, there is the common question of the Indian ownership. But to this bill there are eight defendants. It is not averred that they represent any larger class, or that there is the common question, so that whatever might be the rule on a properly made case is not material, because this bill makes no such case. And were it otherwise, the objection remains that complainants seek in equity to have confirmed and quieted claims of title for which there is an adequate remedy at law without showing a title so established, or any attempt in that direction. Equity will not take jurisdiction where the title has not been established at law.

The case of *Washburn's Appeal*, 105 Pa. St., 480, is in point. There a bill was filed, praying for an injunction to restrain defendants from entering upon or passing along

a certain lane in possession of the complainants, and for a decree to set apart complainants' alleged title to the premises. It was said (p. 482):

"In actions respecting real property, therefore, if there be no equitable ground of relief involved, the rights of the parties must be determined at law; when thus determined, or when they are admitted in the pleadings, or otherwise clearly appear, an equity based upon that right, superinduced by the acts of the parties, may be asserted, and a decree for equitable relief made; thus equity is made the means, not of establishing the legal right, but of giving adequate protection in the enjoyment of it when thus established. No irreparable injury has been shown, and it does not yet appear that a multiplicity of suits must result under proceedings at law; all parties in interest may be put upon the record in a single suit, and *non constat* that the trial and determination of that suit may not end the controversy; the right to equitable relief may follow, if any equity is superinduced by the acts of the parties, but the interference of equity in such a case rests, as stated by Chan. Kent, in *Gardner* v. *The Village of Newburgh*, 2 Johns., Ch. Rep., 164, 'on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which upon just and equitable grounds ought to be prevented.'"

Surely, the complainants here have not by their bill shown that they have a clear and certain right to the enjoyment of the property in question, and even though there may be different defendants, equity is without jurisdiction upon the showing here made.

## III.

### THE COMPLAINANTS' LACHES.

The United States and the states bordering on Lake Michigan have exercised sovereignty and acts of ownership over the waters of Lake Michigan and the submerged lands for more than one hundred years. States

have been created in part out of the territory occupied by the lakes. National and state laws regulating navigation, establishing harbor lines, permitting the reclamation of submerged lands, adjusting and compromising claims for riparian rights, have been from time to time enacted. It is averred in paragraph 16 (Rec., 5) that many persons, including the defendants, have "without the consent of these complainants or of the Pottawatomie Nations from time to time seized tracts of land, both reclaimed, artificially made, and others"; and in paragraph 21 it is charged, in substance (Rec., 7), that the Illinois Central Railroad Company filled in portions of Lake Michigan in 1852, "and has ever since then held and occupied the same without the consent of the complainants, or of the Pottawatomie Nations." It is not pretended in the bill that the complainants are not citizens of the United States, or that they are now, or have been, under any disability to begin actions challenging the invasion of their alleged rights. The bill presents the case of an unexplained delay for more than half a century in the commencement of a suit to question claims of ownership and acts of possession admitted by the bill, and which from their nature were open and notorious. An absolute title is asserted—not one in subserviency to the United States. Equity will not act after such long delay. The rule of laches applies.

In *Schrimpscher* v. *Stockton*, 183 U. S., 290, an action of ejectment was brought by the heirs of a deceased Wyandot Indian. The statute of limitation was pleaded. The court said (p. 296):

"Plaintiffs, however, seek to avoid the effect of the statute by insisting, first, that statutes of limitations do not run against Indians;

* * * * *

1. Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not

chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix* v. *Patrick,* 145 U. S., 317, 330, S. C., 36 Fed. Rep., 457, 461; *Swartzel* v. *Rogers,* 3 Kansas, 374; *Blue Jacket* v. *Johnson Co.,* 3 Kansas, 299; *Wiley* v. *Keokuk,* 6 Kansas, 94; *Ingraham* v. *Ward,* 56 Kansas, 550, they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty."

In *Felix* v. *Patrick,* 145 U. S., 317, the representatives of a deceased Sioux Indian filed a bill averring the issue of a certificate of land scrip, in connection with which the deceased, in her lifetime, executed a power of attorney in blank and a quit claim deed in blank, which came into the possession of Patrick, who caused the blanks to be filled in and the location made under the certificate. Congress, on the procurement of Patrick, confirmed his title to the tract. The Indian was ignorant of these steps until August, 1887, when the Sioux Indians became citizens of the United States. In 1888, the bill was filed. Upon a demurrer the court dismissed the bill on the ground, in part, that complainants and their ancestor were bound to use reasonable diligence in discovering the fraud and seeking redress. It is said (p. 330):

"In reply to this defence of laches, plaintiffs rely mainly upon the fact that Sophia Felix and her heirs were at the time, and continued to be until 1887, tribal Indians, members of the Sioux Nation, residing upon their reservation in the State of Minnesota, and incapable of suing in any of the courts of the United States. We are by no means insensible to the force of this suggestion. Whatever may have been the injustice visited upon this unfortunate race of people by their white neighbors, this court has repeatedly held them to be the wards of the nation, entitled to a special protection in its courts, and as persons 'in a state of pupilage.' * * * But their very analogy to persons under guardianship suggests a limitation to their pupilage, since the utmost term of disability of an infant is but 21 years, and it is very rare

that the relations of guardian and ward under any circumstances, even those of lunacy, are maintained for a longer period than this. It is practically admitted in this case that, in 1887, when their relations with their tribe were severed by accepting allotments of land in severalty under the treaty of April 29, 1878, they became citizens of the United States; that they were then chargeable with the same diligence as white people in the discovery of this fraud."

It was accordingly held that the rule of laches should be applied, but if so in that case, where there was concealment and fraud, how much stronger should the rule apply where the adverse sovereignty and claim of ownership has been open and notorious, and where the bill admits acts of possession by the defendants extending back for more than sixty-five years. No fact in excuse of the delay is averred. The complainants were not mislead or deceived, nor were they under any disability. They are citizens by virtue of the acts of February 8, 1887, and May 8, 1906, as well as of the various treaties and acts by which allotments have been made to the members of the Pottawatomie Nation.

## IV.

### THE MERITS.

While the foregoing defects in the bill are submitted, the appellees invite the court's consideration of the merits of the claim, confident that it is without foundation. Whether this Indian claim is viewed from the standpoint of the treaty of August 3, 1795, or the Indian rights prior thereto, or from the subsequent treaties and legislation, it will be manifest that since the dominion of Great Britain over the territory, the Indians have had no sovereignty or ownership of Lake Michigan or its submerged lands, and that whatever rights were allotted to

them, by treaties or otherwise, in surrounding lands were subsequently receded; that nearly a century ago, the United States inaugurated the policy of removing the Indians from this territory and terminating all their existing rights; that the policy was thoroughly carried out and so consummated as to leave no shadow of justification for the claim now made. The merits are here reviewed, however, not from apprehension, but because any claim to property of such great value must be taken seriously.

The first claim of the bill is that the Pottawatomie Nation of Indians "were the owners of and in possession and in occupancy as a sovereign and independent nation, from time immemorial" preceding the treaty of August 3, 1795, of large tracts of land around and along the shores of Lake Michigan, "including all of Lake Michigan which is south of" a line running between Milwaukee River, Wisconsin, and the mouth of the Grand River, Michigan (Rec., 2)—an assertion directly denied by the decisions of this court. It has been held repeatedly that the Indian right was that of mere occupancy, which the United States might terminate either by purchase or conquest, and that the Indians had no right in unoccupied parts of the territory, including the Great Lakes.

The case of *Johnson* v. *M'Intosh*, 8 Wheat., 543, is directly in point. It was an action of ejectment brought by grantees under deed made October 18, 1775, by the Piankeshaw Indians, who were afterwards parties to the treaty of August 3, 1795. The land conveyed was in what is now Illinois. The suit was against persons who afterwards, July 20, 1818, acquired title from the United States. Every contention made for the present complainants was there urged in support of the Indian deed, but a judgment for the defendants, who later acquired title from the United States, was affirmed. The great controlling principle was thus stated (p. 584):

"Thus all the nations of Europe who have acquired territory on this continent have asserted in themselves and have recognized in others the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the War of our Revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States' whose boundaries were fixed in the second article. *By this treaty the powers of government and the right to soil which had previously been in Great Britain passed definitively to the United States.* We had before taken possession of them by declaring independence, but neither the Declaration of Independence nor the treaty confirming it could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted that either the United States or the several states had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, *and that the exclusive power* to extinguish that right was vested in that government, which might constitutionally exercise it."

Reference was made to certain acts of Virginia and to the Ordinance of 1787, the court saying (p. 586):

"The lands in controversy lay within the chartered limits of Virginia and were ceded with the whole country northwest of the River Ohio. This grant contained reservations and stipulations which could only be made by the owners of the soil; and concluded with a stipulation that 'all the lands in the ceded territory not reserved should be considered as a common fund for the use and benefit of such of the United States as had become, or shall become, members of the Confederation.' * * * *The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title and to grant the soil has never, we believe, been doubted.*"

The court again referred to the rights which passed from the British Government to the United States, saying (p. 588):

"The British Government, which was then our gov-

ernment, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of the British Colonies. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the River Mississippi by the sword. The title to a vast portion of the lands we now hold originates in them. It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it."

The principles announced by Chief Justice Marshall, in that opinion, have been adhered to whenever the like question has arisen. The title and right of sovereignty in the lands and waters acquired from Great Britain passed to the United States, and, through it, to the several states since organized.

Another early case, in which the same principle is recognized, is *Mitchel et al.* v. *United States,* 9 Peters, 711, which involved a claim to the lands in East Florida, the title to which was derived from the grant to the Creek and Seminole Indians, ratified by the local authorities of Spain, before the cession of Florida by Spain to the United States. On account of that ratification, the claim was confirmed, but in the course of the opinion it is said (p. 745):

"As Florida was for twenty years under the dominion of Great Britain, the laws of that country were in force as the rule by which lands were held and sold; it will be necessary to examine what they were, as applicable to the British provinces before the acquisition of the Floridas by the treaty of peace, in 1763. One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied and were considered as owning them, by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was

in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent.

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee which passed from the crown, by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, *until they abandoned them. made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians.* * * * Such, too, was the view taken by this court, of Indian rights, in the case of *Johnson* v. *M'Intosh*, 8 Wheat., 571, 604, which has received universal assent."

A later case involving the Indian title to lands in Wisconsin, is *United States* v. *Cook*, 19 Wall., 591. The general rule was thus stated (p. 592):

"The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. It was decided by this court, as early as 1823, in *Johnson* v. *M'Intosh*. The authority of that case has never been doubted. The right of the Indians to their occupancy is as sacred as that of the United States to the fee. but it is only a right of occupancy. *The possession when abandoned by the Indians attaches itself to the fee without further grant.*"

The foregoing cases are sufficient for the conclusion

that the Indian right was limited to that of occupancy, the ultimate title being in the United States, and that the right of possession when abandoned by the Indians attached to the government's title without further grant. Consistently therewith it is held that where the territory, when discovered, was unoccupied, or the lands subject to tide waters, the complete title and right to possession at once vested in the crown, or later in the United States.

In *Shively* v. *Bowlby*, 152 U. S., 1, the court considered the title to lands below high-water mark in the City of Astoria, Oregon, and in doing so stated the principles of the title to tide-water lands. It was said (p. 14):

"The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the Constitution and laws of the United States.

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the king as the representative of, and in trust for, the nation; *and all vacant lands, and the exclusive power to grant them, were vested in him.* The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And, upon the American Revolution, all the rights of the crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the Constitution of the United States. *Johnson* v. *M'Intosh*, 8 Wheat., 543, 595; *Martin* v. *Waddell*, 16 Pet., 367, 408-410, 414; * * *"

The court in that case considered the title to submerged lands, both before and after the creation of states out

of the territory, and stated its conclusion as follows (p. 57):

"Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign, for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the king, for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.

The new states admitted into the union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters."

In *Martin* v. *Waddell*, 16 Pet., 367, an action of ejectment was brought for one hundred acres of land covered by water in Raritan Bay, in the Township of Perth Amboy, New Jersey. The land claimed was beneath the

navigable waters of the Raritan River and Bay, and the principal right in dispute was the property in the oyster fisheries in the public rivers and bays of East New Jersey. The claim was made under the charters of Charles the Second to his brother the Duke of York, in 1664 and 1674. In reviewing the nature of the interest acquired by the duke, it was said (p. 409):

"The country mentioned in the letters patent, was held by the king in his public and regal character as the representative of the nation, and in trust for them. The discoveries made by persons acting under the authority of the Government were for the benefit of the nation; and the crown, according to the principles of the British constitution, was the proper organ to dispose of the public domains; and upon these principles rest the various charters and grants of territory made on this continent. The doctrine upon this subject is clearly stated in the case of *Johnson* v. *M'Intosh*, 8 Wheat., 595. In that case the court, after stating it to be a principle of universal law that an uninhabited country, if discovered by a number of individuals who owe no allegiance to any government, becomes the property of the discoverers, proceed to say that, 'If the discovery be made and possession taken under the authority of an existing government which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national dominions; by that organ, in which all territory is vested by law. According to the theory of the British constitution all vacant lands are vested in the crown as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain.'"

The principle of these cases includes the Great Lakes, because, in the very nature of things, there was no occupancy of those great bodies of water by the Indians. Their uses of those waters were limited to the borders

along the lands which they occupied, and as a mere incident thereto. There was no general possession or use of the waters except as so incidental.

In *Illinois Central Railroad Company* v. *Illinois*, 146 U. S., 387, which involved the ownership of certain lands reclaimed by the company from Lake Michigan, the court sustained the company's ownership of the lands which it then had reclaimed and actually possessed. In the opinion, it is said (p. 435):

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee* v. *Hagan*, 3 How., 212; *Weber* v. *Harbor Commissioners*, 18 Wall., 57.

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

And not only does it follow from the foregoing decisions that the sovereignty over the waters of Lake Michigan and the title to the lands submerged thereby has been in either the United States or the states along its

borders since the treaty of peace with Great Britain, but the court will know that whatever possession the Indians had of the lakes was incidental to their possession of the shores, and terminated with the abandonment of the shores. It is averred in paragraph 14 of the bill (Rec., 4), as follows:

"That thereafter, at various times, various cessions were made by said Pottawatomie Nation to the United States by treaty between the United States and said Pottawatomie Indians, purporting to be bounded on the east by the then shores of Lake Michigan to and beyond the boundary line between the States of Wisconsin and Illinois on the north, and to and beyond the boundary line between the States of Illinois and Indiana on the south and southeast; but that none of such cessions purported to run further east, northeast or north than the then west, southwest or south shores of Lake Michigan."

It is unnecessary in this connection, therefore, to cite the treaties. The bill admits the recession of the shore lands, so that necessarily there was an abandonment of whatever possession the Indians had of that part of Lake Michigan. The rule is, that upon such abandonment the Indian rights vested in the Government without further grant.

In *United States* v. *Cook*, 19 Wall., 591, it is said (p. 593):

"The possession when abandoned by the Indians, attaches itself to the fee without further grant."

The other source of title averred is the treaty of August 3, 1795 (7 U. S. Stats. at Large, p. 49), made not with the complainants, or the Pokagon Band, but with the Pottawatomie Nation or tribe and other tribes of Indians. The general purpose of that treaty was to accomplish the vacation by the Indians of any lands occupied by them east of the general boundary line described in Article III, which was a north and south line through about the middle of the State of Ohio. By that article

the Indian tribes ceded all their claims to the lands lying eastwardly and southwardly of the general boundary line, and also several specified pieces of land westerly of that line, including the following:

"(14) One piece of land six miles square at the mouth of the Chikago River emptying into the southwest end of Lake Michigan, where a fort formerly stood."

The part of the treaty by which the United States relinquished lands to the Indians is in Article IV, which so far as material to this issue, is as follows:

"In consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians, and to manifest the liberality of the United States, as the great means of rendering this peace strong and perpetual, the United States relinquish their claims to all other *Indian lands* northward of the River Ohio, eastward of the Mississippi, *and westward and southward of the Great Lakes* and the waters uniting them, according to the boundary line agreed on by the United States and the King of Great Britain, in the treaty of peace made between them in the year 1783."

(7 U. S. Stats. at Large, p. 51.)

It is upon that relinquishment that the complainants base their claim. But it falls far short of a grant of Lake Michigan. It does not purport to grant the Great Lakes, or the waters uniting them, but the "Indian lands" lying "westward and southward of the Great Lakes and the waters uniting them."

Complainants insist, however, that the lakes were granted, because of the clause in the description reading "according to the boundary line agreed on by the United States and the King of Great Britain"; but the use of that clause of the description is to define the northerly boundary of the "Indian lands" ceded rather than the waters of the Great Lakes. The map and contours of the lands along the national boundary line explain the

purpose of that clause of the description. All the lands were ceded up to the national boundary, even though divided by the waters of the lakes; but it was not intended to relinquish the waters, or otherwise the clause "westward and southward of the Great Lakes and the waters uniting them" would have been omitted as not only unnecessary but directly contrary to such intention. When there is put together the fact that the grant was of "Indian lands" described as lying "westward and southward of the Great Lakes and the waters uniting them," it is not possible to conclude an intention of the Government to convey the sovereignty and title of the lakes themselves.

Moreover, to hold the Great Lakes within the relinquishment by the United States, under the language used in making the cession, will be contrary to the principles by which such grants are construed.

In *Shively* v. *Bowlby,* 152 U. S., 1, it is said (p. 13):

"It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or the long usage under it, clearly indicates that such was the intention."

In *Martin* v. *Waddell,* 16 Pet., 367, the court, referring to grants bordering navigable waters, said (p. 411):

"Grants of that description are therefore construed strictly—and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it."

The intent not to include the Great Lakes in the cession made is further manifest by the description of the safe passages guaranteed by the Indians described in the last paragraph of Article III of the treaty, as follows:

"And the said Indian tribes will allow to the people of the United States a free passage by land and by water, as one and the other shall be found convenient, through

their country, along the chain of posts hereinbefore mentioned; that is to say, from the commencement of the portage aforesaid at or near Loromie's store thence along said portage to the St. Mary's, and down the same to Fort Wayne, and then down the Miami *to Lake Erie;* again from the commencement of the portage at or near Loromie's store along the portage from thence to the River Au-Glaize, and down the same to its junction with the Miami at Fort Defiance; again from the commencement of the portage aforesaid, to Sandusky River, and down the same *to Sandusky Bay and Lake Erie,* and from Sandusky to the post which shall be taken at or near the foot of the rapids of the Miami of the lake; and from thence to Detroit. Again *from the mouth of Chikago,* to the commencement of the portage, between that river and the Illinois, and down the Illinois River to the Mississippi, also from Fort Wayne along the portage aforesaid which leads to the Wabash, and then down the Wabash to the Ohio. And the said Indian tribes will also allow to the people of the United States the free use of the *harbors and mouths of rivers* along the lakes *adjoining the Indian lands,* for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety."

(7 U. S. Stats. at Large, p. 50.)

It will be noted that the different routes described end upon reaching the lakes or start from the lakes; that there is no mention of a safe passage across or upon Lake Michigan, or any other lake, and that the free use allowed is of "the harbors and mouths of rivers along the lakes *adjoining the Indian lands,*" and not of the lakes themselves. In other words, the free passage is through the Indian *lands,* and not over the waters of the lakes—manifestly because the latter is not within the relinquishment.

Moreover against the assertion of absolute title averred in the bill under the treaty of 1795 is Article V thereof, which provides that in order to prevent any misunderstanding about the "Indian lands relinquished"

by the United States, in the fourth article, it is expressly declared that

"The Indian tribes who have a right *to those lands*, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell *their lands, or any part of them*, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment *of their lands* against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."

That article accords with the Indian right as explained by the many decisions. It is in harmony with the treaty as a whole which deals with lands as distinct from the Great Lakes, and aids the interpretation which gives force to the words of the relinquishment "and westward and southward of the Great Lakes."

The case of *Beecher* v. *Wetherby*, 95 U. S., 517, was to replevin certain saw logs cut from lands included within an Indian cession in Wisconsin, in 1872. The court, in discussing the treaty, said (p. 525):

"It is true that, for many years before Wisconsin became a state, that tribe" (Menomonee tribe) "occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of lands claimed by different tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States,

subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government."

However, the answer to the claim averred in the bill does not rest alone on the general right of the Indians or the treaty of 1795. Many subsequent treaties with the Pottawatomie tribe evidence the care with which the United States obtained the recession of all the "Indian lands" bordering Lake Michigan and the intention to terminate all such rights in this territory.

On August 24, 1816, a treaty was made at St. Louis, between Ninian Edwards, and the "chiefs and warriors of the united tribes of Ottawas, Chipawas, and Pottowotomees, residing on the Illinois and Melwakee Rivers, and their waters, *and on the southwestern parts of Lake Michigan.*" By Article I of that treaty the Indians ceded to the United States

"all the land contained within the following bounds, to wit: beginning on the left bank of the Fox River of Illinois, ten miles above the mouth of said Fox River; thence running so as to cross Sandy Creek, ten miles above its mouth; thence, in a direct line, to a point ten miles north of the west end of the Portage, between Chicago Creek, which empties into Lake Michigan, and the River Depleines, a fork of the Illinois; *thence, in a direct line, to a point on Lake Michigan, ten miles north-*

*ward of the mouth of Chicago Creek; thence, along the lake, to a point ten miles southward of the mouth of the said Chicago Creek;* thence, in a direct line, to a point on the Kankakee, ten miles above its mouth; thence, with the said Kankakee and the Illinois River, to the mouth of Fox River, and thence to the beginning."

(7 U. S. Stats. at Large, p. 147.)

By that treaty the Indians receded to the United States all the lands bordering the part of Lake Michigan now in controversy, and just as the description in the treaty of 1795 is of lands "westward and southward of the Great Lakes," so the eastern boundary in the later treaty is to Lake Michigan, and thence "along the lake."

On July 29, 1829, a treaty was made at Prairie du Chien, between the United States and "the United Nations of Chippewa, Ottawa, and Pottawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitoouck Rivers," by Article I of which the Indians ceded with other territory the following:

"And, also, one other tract of land, described as follows, to wit: Beginning on the western shore of Lake Michigan, at the northeast corner of the field of Antoine Ouimette, who lives near Gross Pointe, about twelve miles north of Chicago; thence, running due west, to the Rock River, aforesaid; thence, down the said river, to where a line drawn due west from the most southern bend of Lake Michigan crosses said river; thence, east, along said line, to the Fox River of the Illinois; thence, along the northwestern boundary line of the cession of 1816, to Lake Michigan; thence, northwardly, along the western shore of said lake, to the place of beginning."

(7 U. S. Stats. at Large, p. 320.)

On October 20, 1832, a treaty was made at Camp Tippecanoe, between Commissioners of the United States and "the Chiefs and Headmen of the Pottawatamie Tribe of Indians of the Prairie and Kaukakee, by Article

I of which the Indians ceded to the United States the land described as

"Beginning at a point on Lake Michigan ten miles southward of the mouth of Chicago River; thence, in a direct line, to a point on the Kaukakee River, ten miles above its mouth; thence, with said river and the Illinois River, to the mouth of Fox River, being the boundary of a cession made by them in 1816; thence, with the southern boundary of the Indian Territory, to the state line between Illinois and Indiana; thence, north with said line, to Lake Michigan; thence, with the shore of Lake Michigan, to the place of beginning."

(7 U. S. Stats. at Large, p. 378.)

On October 27, 1832, a treaty was made on the Tippecanoe River, between Commissioners for the United States and "the Chiefs and Warriors of the Potowatomies, of the State of Indiana and Michigan Territory," Article I of which is:

"The Chiefs and Warriors aforesaid cede to the United States, *their title and interest to lands in the States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River.*"

(7 U. S. Stats. at Large, p. 399.)

Surely, the language of that cession is sufficient answer to every claim made in the bill.

September 26, 1833, a treaty was made at Chicago, between the United States and "the United Nation of Chippewa, Ottawa and Potawatamie Indians, of the other part, being fully represented by the Chiefs and Headmen whose names are hereunto subscribed," by Article I of which the following cession was made:

"The said United Nation of Chippewa, Ottowa, and Potawatamie Indians, cede to the United States *all their land, along the western shore of Lake Michigan,* and between this lake and the land ceded to the United States by the Winnebago Nation, at the treaty of Fort Armstrong made on the 15th September 1832—bounded on the

north by the country lately ceded by the Menominees, and on the south by the country ceded at the treaty of Prairie du Chien made on the 29th July 1829—supposed to contain about five millions of acres."

(7 U. S. Stats. at Large, p. 431.)

In part consideration of the last cession the United States granted to the United Nation of Indians, "to be held as other Indian lands are held," a tract west of the Mississippi River, and by Article II of the treaty it was stipulated:

"That as fast as the said Indians shall be prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes. It being understood, that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately on the ratification of this treaty, but to be permitted to retain possession of the country north of the boundary line of the said State, for the term of three years, without molestation or interruption and under the protection of the laws of the United States."

(7 U. S. Stats. at Large, p. 432.)

On September 27, 1833, Articles Supplementary to the last foregoing treaty were made between the said Commissioners and "the Chiefs and Head-men of the said United Nation of Indians, residing upon the reservations of land situated in the Territory of Michigan, south of Grand River," by which the Chiefs and Head-men ceded to the United States all their land in Michigan south of the Grand River to the Indiana line, and agreed that:

"The said chiefs and head-men and their immediate tribes shall be considered as parties to the said treaty to which this is supplementary and be entitled to participate in all the provisions therein contained, as a part of the United Nation; and, further, that there shall be paid by the United States, the sum of one hundred thousand dollars; to be applied as follows: * * *"

(7 U. S. Stats. at Large, p. 442.)

It will be noted that Pokagon is among the beneficiaries described in that schedule as entitled to receive two thousand dollars.

Numerous other treaties with the Chiefs of the Pottawatomie Nation, to whom had been given particular tracts of land, under prior treaties, were made under dates of December 4, 1834, December 10, 1834, December 17, 1834, March 26, 1836, March 29, 1836, April 11, 1836, April 22, 1836, August 5, 1836, September 20, 1836, September 22, 1836, September 23, 1836, whereby the particular Indians relinquished their allotments and agreed to move within a limited time to the territory provided for the Pottawatomie Nation west of the Mississippi River. Practically all these treaties require the payment of large sums of money, not only to bear the expenses of removal, but to purchase particular interests or equities found to exist. They are mentioned as illustrating the detail and care with which the Federal Government secured formal relinquishments of all Indian rights in this territory. An examination of them leaves no room for doubt of the intention of the Government to acquire the recession of all the lands which had previously been ceded to the Indians; to terminate all rights of occupancy, or otherwise, which the Indians had in Illinois, Indiana and the southern part of Michigan. And it is not to be overlooked that in this list of treaties is that of October 27, 1832, with "the Chiefs and Warriors of the Pottawatomies, of the State of Indiana and Michigan Territory," by which they ceded their title and interest "to lands in the States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River," as above stated.

It is clear that whatever rights were ceded to the Indians by the earlier treaties were recovered by the later treaties, in which broad language to that end is used.

In *Crews* v. *Burcham*, 1 Black, 352, which related to lands in Illinois and considered the treaty of 1832, the statement of the court included the following:

"By the treaty of 1832 the Pottawatomie Indians ceded to the United States all their lands in Illinois, Indiana and Michigan south of the Grand River, and by the same treaty the United States agreed to grant certain quantities of land to certain members of the tribes."

In the opinion the effect of the treaty is repeated in substantially like terms (p. 355):

"By treaty with the Pottawatomie tribe of Indians of October 27, 1832, the Nation ceded to the United States all their lands in Illinois and other States, subject to certain reservations for which patents were to be issued."

In *Doe* v. *Wilson*, 23 How., 457, which was an ejectment to lands in Northern Indiana, and involved the effect of the treaty of 1832, it was said (p. 461):

"By the treaty of October 27, 1832, made by the United States, through Commissioners, with the Pottawatomie tribe of Indians of the State of Indiana and Michigan Territory, said nation ceded to the United States their title and interest in and to their lands in the States of Indiana and Illinois, and the Michigan Territory, South of Grand River."

In that case the court again stated the character of title held by the Indians, as follows (p. 463):

"The Pottawatomie nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reservees took by the treaty, directly from the nation, the Indian title; and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made, in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the territory ceded, but as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land to which the United States title was either added, or promised to be added, and it matters not which for the purposes of this controversy for possession."

Throughout that case it is recognized that by the treaty of 1832, all rights of the Pottawatomie Nation in Illinois were ended, except the allotments made to particular Indians, not here in controversy. Moreover, the description in the treaty of 1832 is broad enough to include every character of right, whether to uplands or submerged lands, which the Indians had. They there relinquished all "their title and interest to lands in the States of Indiana and Illinois and in the Territory of Michigan South of Grand River."

On June 5th and 17th, 1846, a further treaty was made between Commissioners and "the various Bands of Pottawatomie, Chippewa and Ottawa Indians," by which they relinquished the lands ceded to them by the treaty of 1833, and removed to the Territory of Kansas, from which such of them as did not accept allotments were subsequently removed to the Indian Territory, under the treaty made February 27, 1867.

The complainants insist, however, that the Indians obtained the title to Lake Michigan and its submerged lands, and did not recede them. There are two sufficient answers. (1) that in the treaties made subsequent to that of August 3, 1795, the recession to the United States is by substantially the same description as was the cession to the Indians by the earlier treaties. In other words, by the treaty of 1795, the territory ceded was located "westward and southward of the Great Lakes and the waters uniting them," while in the treaty of August 24, 1816, the tract then receded was bounded by a line running "thence, in a direct line, to a point on Lake Michigan, ten miles northward of the mouth of Chicago creek; thence, along the lake, to a point ten miles southward of the mouth of said Chicago creek," etc. Moreover the treaty of 1832 was a general relinquishment of *all* the Indian rights to "lands in the

States of Illinois, Indiana, and a part of Michigan"; (2) that under all the authorities, the Indians acquired only the right of occupancy, and there was at no time an occupancy of Lake Michigan, except as an incident to the possession held of the lands bordering upon it. Whenever the right to occupy the lands was reconveyed, the incidental use of the waters of Lake Michigan necessarily followed and was abandoned.

And not only was there a re-cession of all the Indian rights previously granted in the territory, but the United States assumed the ownership, control and sovereignty of the Great Lakes throughout the entire period. They caused the waters along the southwesterly shore of Lake Michigan to be included in the State of Illinois, and that State has repeatedly exercised domain over the waters, as witness the Act of 1869, authorizing the Illinois Central to take possession of a part thereof, and the various acts authorizing the Park Boards to construct parkways upon submerged lands and to settle riparian rights with the shore owners, which are noted in the twenty-first paragraph of the bill. (Rec., 8.)

These various acts of the Government, together with the care displayed in obtaining the recession of all Indian lands, indicate a manifest purpose to terminate whatever rights the Indians had in the territory. The claims made in the bill are utterly inconsistent with the purpose of the subsequent treaties, and, in the face of the clear intention of the Government, it is not now for the court to recognize a condition contrary to that manifest intention.

*M. K. & T. Ry.* v. *Roberts*, 152 U. S., 114, 116.
*Kindred* v. *Union Pacific Ry. Co.*, 168 Fed., 648, 652.
*Lone Wolf* v. *Hitchcock*, 187 U. S., 553, 565.

*Stephens* v. *Cherokee Nation*, 174 U. S., 445, 483.
*Choate* v. *Trapp*, 224 U. S., 665, 671.

The doctrine of the cited cases is that so manifest an intention of the Government will not be disturbed by the courts.

The near approach of the hearing on this appeal has made necessary the preparation of this brief and argument without having copy of appellants' brief, but in the court below they quoted extensively from *Worcester* v. *Georgia*, 6 Pet., 536, to sustain their claim of an absolute ownership by the Indians of the territory in dispute. It will suffice to say in answer that, as pointed out by the court, the conditions of that case depended largely upon grants and cessions made or approved by the foreign governments owning the territory before the cession to the United States, and the issue was of the validity of certain statutes of Georgia, as against the treaties and jurisdiction of the United States over the Indian tribes. There is nothing in the case, when the facts are considered, in any way out of line with *Johnson* v. *M'Intosh*, 8 Wheat., 543, and other cases above cited.

Another contention was that the Government has repeatedly recognized the title of the Great Lakes in the Indians, by treaties made, and, among others, was cited the treaty of Detroit, of November 17, 1807 (7 U. S. Stats. at Large, p. 105), but if Article I of that treaty, in which the cession was made, is read, it will be seen that the cession there, as in other treaties, was of "all right, title and interest which the said nations now have or claim, or ever had or claimed, in or unto *the lands* comprehended within the following described lines and boundaries," and then follows a description of an exten-

sive territory, the easterly boundary of which followed the boundary line between the United States and Upper Canada, down through the River St. Clair, Lake St. Clair, and River Detroit, into Lake Erie, to a point due east of the Miami River. The conveyance was of the *lands*, and though the boundaries included part of the waters of the lakes, it was a part in which there were numerous islands, and the cession was only of "the lands comprehended" therein.

Another like reference was to the treaty of March 28, 1836, with the Ottawa and Chippewa Nations of Indians, which, it is claimed, ceded to the Government parts of Lakes Michigan and Superior, but the description in the first article of that treaty covered an extensive part of Northern Michigan, in which were many islands and irregular land boundaries. The grant was of "the tract of country" within the described boundaries, and following the description is the clause "comprehending all the lands and islands within these limits not hereinafter reserved." There is surely nothing in that treaty to justify the claim that the United States recognized the Indians as the owners and sovereigns of Lake Michigan.

A further contention then made was that in the treaty of August 3, 1795, the Government recognized the Indian title to the Lakes, by the description of the thirteenth special tract ceded by the Indians, under Article III. That description is:

"(13.) The post of Michillimackinac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on lake Huron, or the streight between lakes Huron and Michigan, and to extend three miles back from the water of the lake or streight, and also the island De Bois Blanc, being an extra and voluntary gift of the Chipewa nation."

But that again was a grant of lands, part of which was the large Island of De Bois Blanc, located in the straits between Lakes Huron and Michigan.

Cases were then cited, such as *United States* v. *Winans,* 198 U. S., 378, 380, *Northern Pacific Ry. Co.* v. *United States,* 227 U. S., 355, 366, to show that the Indians should be favored in the interpretation of treaties, but in none of the cases is there a suggestion that will justify the court at this late day in overturning the settled principles which have governed the Indian titles or the century old policy of the Government to extinguish all rights of the Indians in the territory in dispute.

Again, they cited *United States* v. *Allen,* 171 Fed., 907, 925, *Gibbons* v. *Chouteau,* 13 Wall., 92, *Sheldon* v. *Donahue,* 40 Kas., 346, 348, in support of claim that laches should not be urged against the complainant, but the cases have little bearing. The claimants in the present bill are citizens of the United States, and they are asserting a title in themselves in fee. They show no disability or circumstance to explain the long delay in the assertion of their claim.

While the appellees have not received appellants' brief, it is believed that if filed nothing will be found therein in conflict with the cases cited in this brief.

The appellees, therefore, submit that the claim averred in the bill is contrary to the Indian title as recognized by this court; to the very terms of the treaty of August 3, 1795; to the subsequent treaties by which the Pottawatomie Nation relinquished to the United States all title and interest to lands in Illinois; to the sovereignty over and ownership of Lake Michigan and its submerged lands, evidenced by the settled policy of the Government since its existence; that the many treaties of

which this court will take notice, together with the authority and acts of ownership of the United States, and, through it, the State of Illinois, for the last seventy-five years, conclusively show an intention of the Government to end all rights of whatsoever character of the Indians in this territory, and under the decisions cited will not permit the recognition of an Indian title by this court.

Respectfully,

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